

Supreme Court of the United States
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-221**

CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
v. *Cross-Petitioners,*

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND
SERVICE, INC.; SEATRAN LINES, INC.; INTERNATIONAL
TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH
CORP.; PITTSTON STEVEDORING CORP.; UNIVERSAL
MARITIME SERVICE CORP.; UNITED TERMINALS CORP.;
and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO,

Cross-Respondents.

**CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

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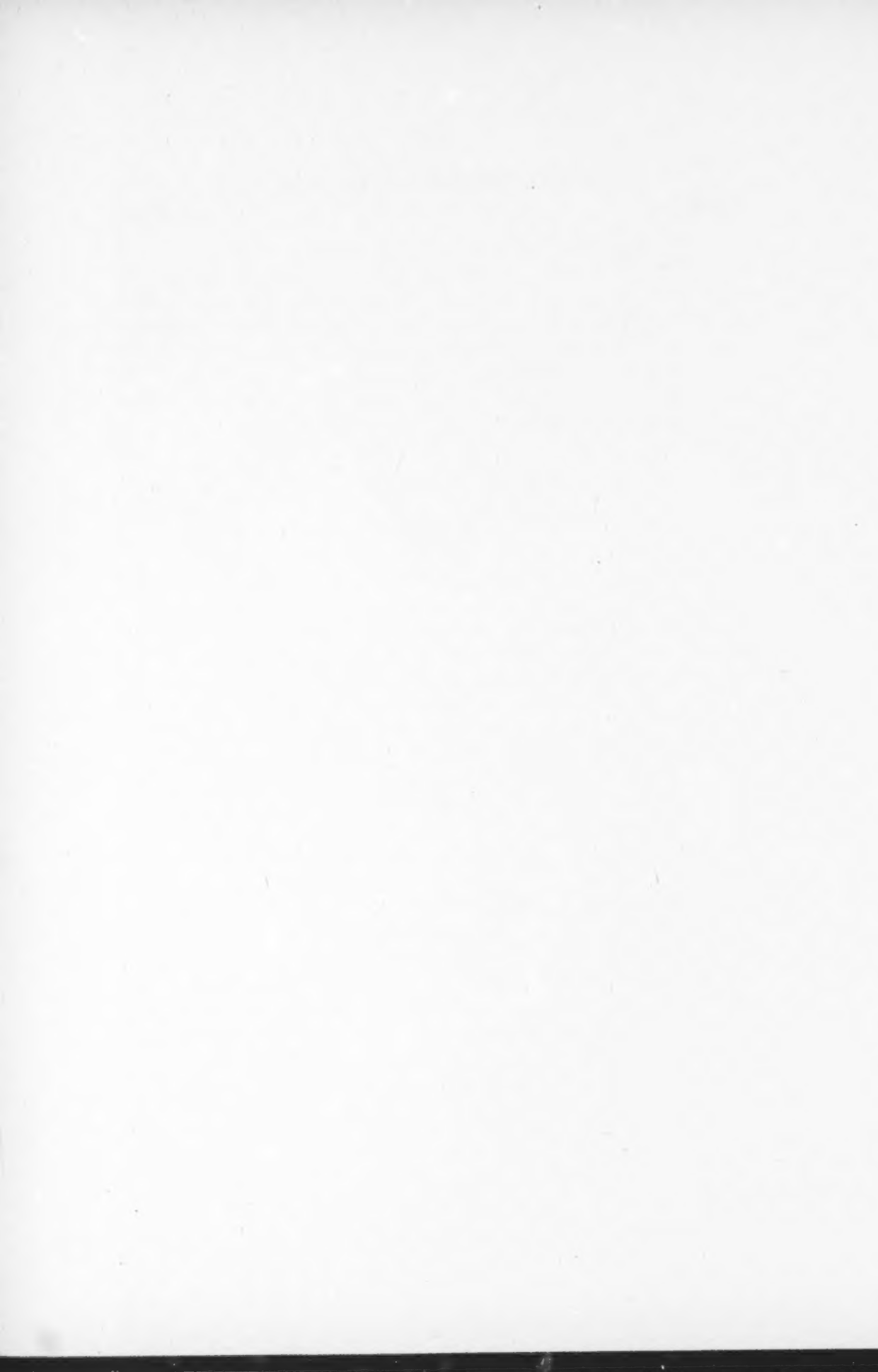
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v.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND
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**CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

Cross-petitioners request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases in the event that this Court should grant the Petition for a Writ of Certiorari in *New York Shipping Association, Inc., et al. v. Consolidated Express, Inc., et al.*, No. 78-1905.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported.¹ It is reproduced as Appendix A in the sepa-

¹ It has unofficially been reported in 1979-1 CCH Trade Cas. ¶ 62,589; and, 86 CCH Lab. Cas. ¶ 11,280.

rately bound joint appendix to the petitions in *International Longshoremen's Association v. Consolidated Express, Inc., et al.*, No. 78-1902 (filed June 20, 1979), and *New York Shipping Association, Inc., et al. v. Consolidated Express, Inc., et al.*, No. 78-1905 (filed June 23, 1979) (App. A at 1a-71a).² The opinion of the United States District Court for the District of New Jersey (App. C at 74a-120a) appears at 452 F.Supp. 1024 (D.N.J. 1977).

JURISDICTION

The judgment (App. B at 72a-73a) of the Court of Appeals was entered on April 16, 1979.³ By an Order entered by the Honorable William J. Brennan, Jr., on July 9, 1979, the time for filing this cross-petition was extended to and including August 10, 1979 (Appendix hereto). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes, which are reproduced in the separately bound joint appendix to the petitions in Nos. 78-1902 and 78-1905 (App. G at 130a-132a), are: § 8(e) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 158(e); §§ 1 and 3 of the Sherman Act, 1890, *as amended*, 15 U.S.C. §§ 1 and 3; § 4 of the Clayton Act, *as amended*, 15 U.S.C. § 15.

² References hereafter are to pages of the separately bound joint appendix in Nos. 78-1902 and 78-1905.

³ On May 18, 1979, the Court of Appeals denied a Petition for Rehearing Not In Banc filed by International Longshoremen's Ass'n, AFL-CIO, and entered an Order amending a footnote in its opinion. The issues which were the subject of the Union's petition for rehearing are not related to the issues involved in this cross-petition.

QUESTION PRESENTED

Is a "labor policy" defense to liability for monetary damages under § 4 of the Clayton Act available to unions and employers whose concerted activities (i) violate the national labor laws and, therefore, are not immune from antitrust sanctions, and (ii) constitute a *per se* violation of the antitrust laws?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Cross-petitioners, Consolidated Express, Inc. ("Conex") and Twin Express, Inc. ("Twin") (hereafter "plaintiffs"), brought these suits to recover damages for injuries they sustained as a result of the blatant boycott of their businesses in 1973 and 1974 by the International Longshoremen's Association ("ILA"), the New York Shipping Association, Inc. ("NYSA"), and certain members of NYSA (hereafter collectively referred to as "defendants"). The boycott was instituted and enforced pursuant to the express terms of certain agreements among the defendants known as the "Rules on Containers" ("Rules") and the "Dublin Supplement." (App. A at 11a, 47a, 57a)

While recounting much of the history of labor relations on the New York and New Jersey waterfronts, defendants' petitions in Nos. 78-1902 and 78-1905 understandably omit mention of the critical facts which gave rise to this litigation. Neither, for example, describes the explicit boycott provisions of the Dublin Supplement; the steamship carrier defendants' admitted refusal to supply plaintiffs with essential containers; the costly rehandling of their filled containers by longshoremen on the piers; or, the blacklist naming Conex and Twin as operating "in violation of" the Rules, which was circulated by NYSA

and ILA to all NYSA members in April, 1973. (App. A at 7a-8a) These undisputed facts are set forth in the Brief for Respondents in Opposition to the petitions in Nos. 78-1902 and 78-1905, which is being filed concurrently with this cross-petition.

B. THE PROCEEDINGS BELOW

In Count I of their complaints, plaintiffs allege that defendants' concerted refusal to deal with them and coercive rehandling of their containers constituted a group boycott in violation of §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1 and 3. Based upon the express terms and admitted implementation of the Rules and the Dublin Supplement and, in addition, upon the prior adjudication of the National Labor Relations Board ("NLRB") holding these same agreements to be illegal "hot cargo" agreements under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e),⁴ plaintiffs moved for partial summary judgment on the issue of defendants' antitrust liability. (App. A at 33a)⁵

⁴ International Longshoremen's Ass'n (Consolidated Express, Inc.), 221 NLRB 956 (1975), *aff'd sub nom.* International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977). A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice proceeding was denied on August 12, 1978.

⁵ Plaintiffs also sought summary judgment on the issue of ILA's liability under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, for the injuries caused by its unfair labor practice, as alleged in Count III of the complaints. Since the lower courts' rulings with respect to these claims are not relevant to the question presented by this cross-petition, they are not set forth herein. Summary judgment was not sought on Count II of the complaints, which charges all defendants with monopolizing or attempting to monopolize the business of "stuffing" and "stripping" less-than-container-load cargo in the Port of New York in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

1. The Decision of the District Court

The District Court denied summary judgment, holding that the NLRB's findings of fact and conclusions of law were not determinative of plaintiffs' Sherman Act claims. In its view, the questions whether defendants' agreements were immune from antitrust scrutiny under the non-statutory labor exemption doctrine and whether their conduct violated the antitrust laws were "inseparable." (App. C at 98a) Refusing to apply the *per se* doctrine of antitrust liability solely because of the labor relations context of these cases, it held that a full-scale rule of reason inquiry was required on the issues of anticompetitive intent and effect. (App. C at 109a-110a, 113a-114a) It also ruled that if plaintiffs had been required to obtain a freight forwarder permit from the Interstate Commerce Commission, their failure to do so would bar recovery on the antitrust claims. (App. C at 114a, 120a) The District Court certified its order (App. D at 121a-122a) for interlocutory appeal under 28 U.S.C. § 1292 (b) on February 22, 1978. (App. F at 126a-127a)

2. The Decision of the Court of Appeals

The Third Circuit disagreed with the District Court's analysis, but affirmed its judgment. (App. A at 55a, 61a, 67a; App. B at 73a) On the question of antitrust immunity, the Court of Appeals held that since the NLRB had conclusively determined that the Rules and Dublin Supplement were illegal under the labor laws, nothing in the national labor policy warranted shielding defendants' implementation of these agreements from antitrust sanctions. (App. A at 47a-48a, 50a) Turning next to the question whether defendants' conduct violated the Sherman Act, the Third Circuit applied "settled antitrust principles" to the undisputed facts of record and, upon finding the Rules and Dublin Supplement to "have horizontal, vertical, and coercive aspects" whose "necessary effect" was to drive plaintiffs from the New York-Puerto

Rico shipping market, it held that the container boycott constituted a *per se* violation of the antitrust laws. (App. A at 56a-61a) It also rejected defendants' so-called "illegality" defense as being essentially no different than the *pari delicto* defense rejected in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (App. A at 63a-65a)⁶

Notwithstanding these holdings, the Court of Appeals affirmed the District Court's denial of summary judgment. In an unprecedented ruling, it held that a complete defense to treble damages liability may still be available to defendants despite their violation of the antitrust laws if, on remand, they could show that: (1) there was no reasonable foreseeability that the agreements in question would be held to violate the labor laws, and (2) the restraint imposed on the secondary market went no further than was reasonably necessary to accomplish a labor objective thought to have been legitimate. (App. A at 53a-55a) This aspect of the Court of Appeals' decision is the subject of the instant cross-petition.

REASONS FOR GRANTING THE WRIT

1. The Question Presented Is Directly Related to the Questions Presented by the Petition in No. 78-1905

Because the Third Circuit's interlocutory rulings with respect to plaintiffs' antitrust claims leave open the possibility that defendants may yet establish a complete defense to treble damages liability under § 4 of the Clayton Act, plaintiffs believe that all of the Questions Presented by the petition in No. 78-1905 are premature for this Court's review. As pointed out in plaintiffs' Brief in Opposition, at 15-16, if defendants are successful on remand there will be no need for this Court to decide the questions they have presented. If, on the other hand,

⁶ These rulings are the subject of the non-union defendants' petition in No. 78-1905.

defendants are unable to establish this potential defense, they will have full opportunity to appeal the decision and thereafter seek certiorari.

Should the Court determine to grant the petition in No. 78-1905, however, plaintiffs believe that this cross-petition should also be granted. The Second Question Presented by that petition essentially challenges as unduly strict the criteria established by the Third Circuit for meeting its newly-fashioned "labor policy" defense. There would be no need to consider the appropriateness of those standards if this Court were to determine that the Third Circuit's creation of the defense was unwarranted in the first place. No factual issues pertaining to defendants' antitrust liability would then remain and an order directing the entry of summary judgment in plaintiffs' favor would be appropriate.

Plaintiffs, therefore, respectfully submit that if the Court deems these issues worthy of consideration, certiorari should be granted on the Question Presented herein since it logically precedes and encompasses the subsidiary question posed by defendants.

2. The Decision Below Conflicts with This Court's Precedents Construing § 4 of the Clayton Act

The Third Circuit held that § 4 of the Clayton Act may be judicially "interpreted" to make room for the novel "labor policy" defense it fashioned. (App. A at 50a-51a) That holding directly contravenes this Court's precedents which consistently have afforded a broad remedial scope to § 4.⁷

⁷ Section 4 provides in relevant part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained

15 U.S.C. § 15 (App. G at 132a)

As early as 1912, this Court held that federal courts may not set up defenses to avoid antitrust sanctions based upon judicial notions of "good results" or of the parties' "good intentions":

The [antitrust] law is its own measure of right and wrong, of what it permits, or forbids, and *the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of the parties, and it may be, of some good results.*

Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 49 (1912) (emphasis supplied). The Court has repeatedly reaffirmed that principle. See, e.g., *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690-96 (1978); *Radovich v. National Football League*, 352 U.S. 445, 453 n.10 (1957); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940). Indeed, only last Term the Court again emphasized that even well-intentioned policy considerations cannot be allowed to alter the express terms of § 4: "*We must take the statute as we find it.*" *Reiter v. Sonotone Corp.*, 47 U.S.L.W. 4672, 4675 (U.S. June 11, 1979) (emphasis supplied). Since "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws," *Radovich v. National Football League*, *supra*, 352 U.S. at 454, plainly the Third Circuit should not have done so.⁸

Moreover, the Third Circuit's creation of this new defense ignores the fact that § 4 is primarily a remedial

⁸ This Court has agreed that "settled antitrust principles" are "appropriate and applicable" in determining whether non-exempt labor activities violate the antitrust laws. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 693 n.6 (1965) (White, J.); *id.* at 715 (Goldberg, J., concurring and dissenting); *id.* at 736-37 (Douglas, J., dissenting). See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940).

statute designed to protect "all who are made victims of the forbidden practices by whomever they may be perpetrated." *Pfizer Inc. v. India*, 434 U.S. 308, 312-13 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). The decision below, in complete disregard of these principles, carves out a new class of "perpetrators" who may entirely escape the statute's penalties merely because of their status as parties to an unlawful labor agreement. That result cannot be reconciled with this Court's explicit statement in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940), that apart from the express limitations upon the reach of the antitrust laws set forth in the Clayton Act, the Sherman Act "makes no distinctions between labor and non-labor cases."

3. The Decision Below Conflicts with This Court's Labor Exemption Decisions

Neither this Court nor any other has ever recognized any additional "labor policy" defenses once concerted union-employer activity has been found non-exempt. To the contrary, a jury verdict imposing treble damages was affirmed in *United Mine Workers v. Pennington*, 381 U.S. 657, 661 (1965) (reversing the decision below on other grounds), without any reference to a defense such as that created here by the Third Circuit. See also *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971). And, in *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971), the Court expressly stated that if a union enters into an agreement with one set of employers incorporating provisions ruinous to the business of non-signatory employers, it "is liable under the antitrust laws for the damages caused by its agreed-upon conduct." Other decisions likewise implicitly recognize that non-exempt union-

employer combinations are answerable in damages for anticompetitive conduct that causes injury to private parties. See *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 634 & n.16 (1975); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 714 (1965) (Goldberg, J., concurring and dissenting).

The Third Circuit's decision thus represents a significant departure from this Court's precedents. Even more importantly, it upsets the delicate balance which the Court has reached between the competing congressional policies expressed in the labor and antitrust statutes. See *Connell Construction Co. v. Plumbers & Steamfitters*, *supra*, 421 U.S. at 622-23, 636. By introducing yet a second opportunity for antitrust defendants to advance labor-related justifications for their anticompetitive conduct, the Court of Appeals has sharply tilted that balance against the goal of antitrust enforcement.⁹ Sound administration of the antitrust laws therefore suggests the need for the Court to resolve the foregoing conflicts and determine the validity of this defense if it deems any of the Third Circuit's antitrust-related rulings worthy of consideration at this time.

⁹ As the Court reiterated last Term, "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, *supra*, 47 U.S.L.W. at 4675-76 (emphasis in original); see also, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, *supra*, 392 U.S. at 138-39. That important function will be seriously undermined by the Third Circuit's decision. The mere prospect that antitrust defendants who engage in blatantly anticompetitive conduct may *still* defeat a claim for treble damages by virtue of this unprecedented defense will undoubtedly chill the enthusiasm of other victims of union-employer combinations for such suits.

CONCLUSION

For the reasons stated, plaintiffs respectfully request this Court to grant their Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in the event that the Court determines to grant the petition in No. 78-1905.

Respectfully submitted,

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Dated: August 10, 1979



APPENDIX

1a

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-9

CONSOLIDATED EXPRESS, INC., ET AL.,
Petitioners,

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 10, 1979.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 9th day
of July, 1979.

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